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10/17/00

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mermelstein

Opposition No. 111,903

Kellogg Company

v.

Paul Ralston

Before Hohein, Rogers, and McLeod, Administrative
Trademark Judges.

By the Board:

Applicant, Paul Ralston, has filed an application to
register the mark CAR FOOD for a wide variety of food and
beverages in International Classes 29, 30 and 32.¹ An

¹ Application Serial No. 75/204,310, filed November 26, 1996,
alleging a bona fide intent to use the mark in commerce. The
word FOOD is disclaimed. The goods identified in the
application are as follows:

Crystallized fruit, processed dates, entrees consisting
primarily of meat, fish, poultry or vegetables, processed
fruit, fruit chips, jerky, kefir, candied fruit snacks,
crystallized ginger, package combinations consisting of
cheese, meat and/or processed fruit, potato chips,
processed pumpkin, sunflower and edible fruit and
vegetable seeds, raisins, fruit and vegetable rinds, snack
dips (excluding salsa and other sauces used as dips),
dairy based beverages, namely, chocolate milk, strawberry
milk and flavored milk drinks and other beverages used as
milk substitutes, namely, flavored soy milk drinks and
bean-based snack food. (International Class 29)

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opposition has been filed by Kellogg Company on the grounds that, *inter alia*, the mark CAR FOOD, as applied to the identified goods, is a merely descriptive term without acquired distinctiveness. Opposer also alleges, among other things, that it is engaged in the manufacture and sale of a variety of food products, and that registration of CAR FOOD by applicant would be inconsistent with opposer's right to use the term descriptively. Applicant has denied the salient allegations in the notice of opposition.

Now before the Board is opposer's motion for summary judgment, filed September 7, 1999. The motion has been fully briefed.²

Grain-based and herbal food beverages, tea, bakery goods, bakery products, caramels, cheese flavored puffed corn snacks, coffee, coffee substitutes, cookies, corn chips, corn curls, crackers, doughnuts, entrees consisting primarily of pasta or rice, ready to eat food bars, granola, mints, muffins, package combinations consisting of primarily bread, crackers and/or cookies, pretzels, puffed corn snacks, cheese flavored puffed corn snacks, rice based snack foods, tortilla chips, truffles (chocolate), wheat-based snack foods, brownies and cereal bars. (International Class 30)

Non-alcoholic and de-alcoholized drinks, namely, beer substitute, fruit drinks and fruit juices, syrups and preparations for making the above named beverages. (International Class 32)

² The parties' October 1, 1999, stipulated motion to extend the period for response to the summary judgment motion is GRANTED. Applicant's motion for suspension of proceedings was withdrawn in light of the Board's September 24, 1999, order granting the

Opposer contends that the term CAR FOOD is used "to refer to food items which are readily eaten in a car." In support of its position, opposer offers dictionary definitions of the terms "car" and "food," seventeen stories extracted from the NEXIS[®] database, using the term CAR FOOD, and the declarations of Rosemary Burt and David A. Herdman, Kellogg product manager and Corporate Counsel-Trademarks, respectively. Attached to Mr. Herdman's affidavit were photocopies of several of opposer's trademark registrations.

In response, applicant contends that "triable issues of fact exist as to whether CAR FOOD is inherently distinctive and entitled to registration on the Principal Register." Applicant has submitted three stories from the NEXIS[®] database,³ a list of the subcategories available in the LEXIS[®] and NEXIS[®] databases, opposer's responses to applicant's requests for admissions and interrogatories, a copy of a pending application from the PTO web site, and the affidavit of Paul Ralston.

Applicable Law

same relief, and will accordingly be given no further consideration.

³ Two of the stories are from foreign publications, and thus have little or no probative value on the question of the meaning of the mark in the United States. See *In re BDH Two Inc.*, 26 USPQ2d 1556 (TTAB 1993); *In re Men's International Professional*

Summary judgment is appropriate in cases where the moving party establishes that there is no genuine issue of material fact which requires resolution at trial and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is material when its resolution would affect the outcome of the proceeding under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is genuinely in dispute if the evidence of record is such that a reasonable fact finder could return a verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 248. The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). "While the initial burden on such a motion is on the movant, if the movant supports [its] position, the

Tennis Council, 1 USPQ2d 1917 (TTAB 1986). We have considered the stories, for what they are worth.

respondent must come forward with specific materials of [its] own to show that there are triable issues of fact or [it] must demonstrate why [it] cannot do so."

Blansett Pharmacal Co. Inc. v. Carmrick Laboratories Inc., 25 USPQ2d 1473, 1476 (TTAB 1992).

Under Trademark Act § 2(e)(1), 15 U.S.C. § 1052(e)(1), a term is merely descriptive of the identified goods if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *E.g.*, *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of all features of the goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods. *In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000); *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with those goods or

services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Merely descriptive marks are unregistrable on the Principal Register, absent a showing of acquired distinctiveness. Trademark Act §§ 2(e)(1), 2(f); 15 U.S.C. §§ 1052(e)(1), 1052(f).

Discussion

We find that opposer has carried its burden of demonstrating that there is no genuine issue of material fact as to whether the term CAR FOOD is merely descriptive of the identified goods. In particular, opposer's NEXIS® evidence demonstrates that the term is used to describe FOOD that can be eaten in a CAR. Moreover, the stories indicate that the term holds this meaning both within the food trade and in common parlance. For example (**emphasis** added):

Manufacturers are playing on consumer's needs for convenience, time, efficiency, and tastiness. No utensils to wash. I've been calling these foods **car foods** for a while, because a prerequisite for market entry is the food's ability to be consumed in a car while driving 80 mph with a cell phone in your hand.

B. Feig, Food & Beverage Marketing p. 33 (August, 1997).

Not all **car foods** are created equal. Before you set off down the path of the roadway gourmet, consider

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the issues of portability, palatability, and neatness - not necessarily in that order.

The Boston Herald, p. 49 (January 19, 1994).

They have also styled items to fit the latest trend known as **car food** - meals eaten while driving.

The Plain Dealer, p. 1G (June 3, 1998).

Very often I'm eating as I'm driving and flinging stuff in the back seat. Anything that's going to be greasy or messy is not **car food**.

J. Loew, The Times Union, p. D1 (July 8, 1998).

Any fisherman will tell you that part of the ritual of pre-dawn tanking up the boat with gas is the accompanying breakfast of boudin. It's eaten as an after-school snack by kids walking home, and as **carfood**, anytime, by those with messy inclinations.

The Times-Picayune, p. F3 (October 31, 1996).

If it must be done, foods that can be held, such as burritos and tacos, do best in the car, as to items like granola bars, single-serving yogurt cups and fruit muffins. Fresh fruit is a good **car food**, too.

Pittsburgh Post-Gazette, p. G-6 (April 29, 1999).

Want to experience a culinary cruising nightmare? Order the Garden Vegi Pita Sandwich, Biggie Fries and Frosty shake.

* * *

Trying to tighten my grip at the bottom only caused a terrible reverse reaction. Soon, I was holding onto the Mount St. Helen's of **car food**. The sandwich erupted, spewing chunks of tomatoes, cucumbers, lettuce and carrots in a tide of sauce.

* * * Oh, the inhumanity.

Denver Rocky Mountain News, p. 3D (July 28, 1997).

As can be seen, the stories are consistent in their use of the term CAR FOOD to describe food conveniently - or at least commonly - eaten in cars.

In response to opposer's evidence, applicant raises several arguments. First, it contends that opposer's dictionary evidence is not dispositive. In this regard, applicant contends that the definitions of the words CAR and FOOD⁴ have multiple meanings, and the meaning of the mark is thus a genuine issue of fact. Applicant proposes that the term CAR FOOD could, for instance, refer to gasoline, motor oil, or brake fluid for automobiles, or even parts for chariots.

While we agree that the dictionary evidence is, by itself, not dispositive, we do not view it as raising a genuine issue of material fact. Although applicant points out that the definitions of record indicate that the words CAR and FOOD have more than one meaning or sense, that is also true of almost every word on the

⁴ We again note that applicant has disclaimed the term FOOD apart from the mark as shown. Applicant also made no argument that it believed FOOD to be distinctive. We view applicant's unqualified disclaimer as an admission that FOOD is at least descriptive of the identified goods. See, e.g., *Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972); *In re Interco Inc.*, 29 USPQ2d 2037 (TTAB 1993); *In re Consolidated Cigar Corp.*, 13 USPQ2d 1481 (TTAB 1989). Applicant cannot now argue that the term FOOD is not descriptive of its identified food items.

reproduced dictionary pages, and indeed, virtually every word in the English language.

Our law is clear on this issue. The descriptiveness of a trademark must be considered in the context of the goods on which it is used or intended to be used, and not in the abstract. *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 200 USPQ at 216; *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). What the mark could mean in another context is irrelevant. When viewed in the context of the goods identified in the subject application - a wide variety of snack and ready to eat foods - the relevant purchasers are not likely to believe the mark to be a veiled reference to motor oil or anything else other than food for consumption in a car.

Moreover, applicant's highly speculative arguments about what the mark *might* mean are not supported by any evidence of how the term actually is or will be perceived by the relevant purchasers.⁵ This is in contrast to

⁵ Applicant's three NEXIS® stories are not to the contrary. None even show use of the term CAR FOOD, although one uses the similar term "dining-car food." This latter article - from a Canadian publication - is of little relevance, although it seems to support opposer's argument more than applicant's.

opposer, which has come forward with evidence of actual use of the term in a descriptive manner.

Next, applicant contends that the following response to one of its requests for admission raises a genuine issue of material fact:

1. Admit that a "car" is an automobile.

ANSWER Denied.

Whatever the reason for opposer's denial, it now seems that both parties agree with the dictionary evidence of record that a "car" is - among other things - an automobile. While we find opposer's strange answer troubling, it does not alter the fact that in ordinary parlance, a car is defined as including an automobile. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 201 (1969).

Next, applicant argues that the seventeen stories submitted by opposer are insufficient to establish the mere descriptiveness of the proposed mark. We disagree. We find that opposer's NEXIS® evidence - particularly when viewed in conjunction with its dictionary evidence - makes out a *prima facie* case of mere descriptiveness. Opposer's evidence, while not voluminous, is not inconsequential, and reflects clear use of the applied-for term in a descriptive fashion.

While food has undoubtedly been consumed in cars for at least a century, it appears from the NEXIS® stories and Mr. Ralston's affidavit that CAR FOOD has only recently emerged as a separate product category discussed or marketed as such. We therefore view the relatively small number of published stories of record referencing the term CAR FOOD as an indication of the recent emergence of the product category, rather than an indication that there is a genuine issue as to the mere descriptiveness of such term. *Cf. In re Ferrero S.p.A.*, 24 USPQ2d 1155, 1156-57 (TTAB 1992). In response to opposer's evidence, applicant has come forward with no evidence in rebuttal or to establish that the term has a non-descriptive connotation to the relevant purchasers.⁶

Finally, applicant argues that the term CAR FOOD is inherently distinctive or, at worst, suggestive of the identified goods. As evidence for this proposition, applicant submits the declaration of Paul Ralston. We find applicant's reliance on the affidavit misplaced. As stated in the affidavit (**emphasis** added):

⁶ Opposer's admission that it knows of no third party use of CAR FOOD as a source identifier is not to the contrary. The fact that others may not have used the term as a source identifier - i.e., as a trademark - has nothing to do with whether the term is descriptive, and instead reflects a general understanding in the field that the term *is* descriptive, and therefore not a trademark.

When I first conceived of the CAR FOOD snack concept, my intent was to embrace the ever-increasing need of consumers to "multi-task" their time, i.e., to perform multiple activities at one time. In my first writings about the brand, I described it as, "[t]he food you eat when doing something besides eating. (**Driving**, Watching TV, Net Surfing or any computer activity.)"

Affidavit ¶ 2.

It was never my intent to market the CAR FOOD products **only** as snacks to be consumed in a car. *
* * CAR FOOD will be marketed to be consumed anywhere, any time.

Affidavit ¶ 5.

Applicant thus admits that the food items to be marketed under the term CAR FOOD are intended to include foods which can be eaten while driving in a car, and that it intends to market the goods as such. The fact that the foods may also be eaten elsewhere, while doing other activities, is irrelevant. As stated above, in order to be found descriptive, a term need not describe all intended uses or attributes of the goods. It is enough if the term describes one use or attribute of the goods. Here, it is clear that, whatever other uses applicant intends for its food, it also intends at least some of the items to be consumed in a car.

In conclusion, we find that there is no genuine issue of material fact, and that opposer is entitled to

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judgment as a matter of law. Fed. R. Civ. P. 56(c).

Accordingly, opposer's motion is GRANTED, the opposition is sustained, and registration to applicant is refused.

G. D. Hohein

G. F. Rogers

L. K. McLeod
Administrative Trademark Judges
Trademark Trial and Appeal

Board